

(d) Ten copies of all direct testimony must be submitted unless the notice of the hearing specifies otherwise.

(e) Upon receipt, direct testimony shall be assigned a number and stamped with that number and the docket number.

(f) Contemporaneous with the publication of the notice of hearing, the Assistant Administrator's direct testimony in support of the proposed regulations and waiver, where applicable, shall be available for public inspection as specified in the notice of hearing. The Assistant Administrator may submit additional direct testimony during the time periods allowed for submission of such testimony by witnesses.

§ 228.8 Mailing address.

Unless otherwise specified in the notice of hearing, all direct testimony shall be addressed to the Presiding Officer, c/o Assistant Administrator, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. All affidavits and exhibits shall be clearly marked with the docket number of the proceedings.

§ 228.9 Inspection and copying of documents.

Any document in a file pertaining to any hearing authorized by this subpart or any document forming part of the record of such a hearing may be inspected and/or copied in the Office of the Assistant Administrator, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910—unless the file is in the care and custody of the presiding officer, in which case the presiding officer shall notify the parties as to where and when the record may be inspected.

§ 228.10 Ex parte communications.

(a) After notice of a hearing is published in the FEDERAL REGISTER, all communications, whether oral or written, involving any substantive or procedural issue and directed either to the presiding officer or to the Assistant Administrator, Deputy Assistant Administrator, or Chief of the Marine Mammal Division, National Marine Fisheries Service, without reference to these rules of procedure, shall be deemed ex parte communications and

are not to be considered part of the record for decision.

(b) A record of oral conversations shall be made by the persons who are contacted. All communications shall be available for public viewing at the place(s) specified in the notice of hearing.

(c) The presiding officer shall not consult any person or party on any fact in issue or on the merits of the matter unless notice and opportunity is given for all parties to participate.

§ 228.11 Prehearing conference.

(a) After an examination of all the direct testimony submitted pursuant to § 228.7, the presiding officer shall make a preliminary determination of issues of fact which may be addressed at the hearing.

(b) The presiding officer's preliminary determination shall be made available at the place or places provided in the notice of the hearing (§ 228.4(b)(8)) at least 5 days before the prehearing conference.

(c) The purpose of the prehearing conference shall be to enable the presiding officer to determine, on the basis of the direct testimony submitted and prehearing discussions:

(1) Whether the presiding officer's preliminary determination of issues of fact for the hearing has omitted any significant issues;

(2) What facts are not in dispute;

(3) Which witnesses may appear at the hearing; and

(4) The nature of the interest of each party and which parties' interests are adverse.

(d) Only parties may participate in the hearing conference and a party may appear in person or be represented by counsel.

(e) Parties who do not appear at the prehearing conference shall be bound by the conference's determinations.

§ 228.12 Final agenda of the hearing.

(a) After the prehearing conference, the presiding officer shall prepare a final agenda which shall be published in the FEDERAL REGISTER within 10 days after the conclusion of the conference. A copy of the final agenda shall be mailed to all parties.

(b) The final agenda shall list: